BOARD OF ALIEN LABOR CERTIFICATION APPEALS
800 K St., N.W.
WASHINGTON, D.C. 20001-8002

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Date:03/28/02
Case No: 2000-INA-00003

In the Matter of:

LAND RESEARCH GROUP, INC.
Employer

On Behalf of:

DANIEL DE LEON
Alien

Appearance: Kendall Norman Cooper
for the Employer and the Alien

Certifying Officer: Richard E. Panati
Philadelphia, Pennsylvania

Before: Holmes, Vittone and Wood
Administrative Law Judges

JOHN C. HOLMES
Administrative Law Judge

**DECISION AND ORDER**

This case arose from an application for labor certification on behalf of alien, Daniel de Leon ("Alien") filed by Employer Land Research group, Inc.. ("Employer") pursuant to 212(a)(5)(A) of the Immigration and Nationality Act, as amended, 8 U.S.C. 1182(a)(5)(A)(the "Act"), and the regulations promulgated thereunder, 20 CFR Part 756. The Certifying Officer ("CO") of the U.S. Department of Labor, Philadelphia, Pennsylvania, denied the application, and the Employer and Alien requested review pursuant to 20 CFR 656.26.

Under 212(a)(5) of the Act, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor may receive a visa if the Secretary of Labor ("Secretary") has determined and certified to the Secretary of State and to the Attorney General that (1) there are not sufficient workers who are able, willing, qualified and available at the time of the application and at the place where the alien is to perform such labor; and, (2) the employment of the alien will not adversely affect the wages and working conditions of the U.S. workers similarly employed.

Employers desiring to employ an alien on a permanent basis must demonstrate that the requirements of 20 CFR, Part 656 have been met. These requirements include the responsibility of the Employer to recruit U.S. workers at the prevailing wage and under prevailing working conditions through the public employment service and by other means in order to make a good faith test of U.S. worker availability.

The following decision is based on the record upon which the CO denied certification and the Employer's request for review, as contained in an Appeal File ("AF"), and any written arguments of the parties.

## STATEMENT OF THE CASE

On April 2, 1999, the Employer filed an amended application for labor certification to enable the Alien to fill the position of Computer System Administrator-Title Searcher in its Real Estate Title Searches business.

The duties of the job offered were described as follows:

> Build & maintained a networking computer system with 5 stations. Install cable to the individual stations. Building the server for the station to access. Installing and configuring the network.
> Must possess knowledge Widow 95,5.1.NT, World Perfect, Microsoft Office, Corel Office Suite.
> Search the records of the D.C. recorder of deeds, accurately abstract each document found in each of the indices for a period of 60 years. Spot problems in the chain of title of defects documents. (Uncorrected)

An Associate Degree, i.e. two years of college in Natural Science and one years experience in the job or one year six months in the related field of Computer System Administrator or Laboratory Assistant were required. Wages were $16.51 per hour. No employees were supervised and the employee would report to the Office Manager. (AF-78-84)

On April 9, 1999, the CO issued a NOF denying certification. The CO found that Employer may have violated 20 CFR 656.21(b)(2) in that the job opportunity was unduly restrictive. Specifically, the requirement for an Associate Degree in Natural Science was not a normal requirement for the job opportunity and appeared tailored to the alien’s qualifications. Corrective action would be to delete the requirement and readvertise or to submit documentation that would prove that the requirements arose from a business necessity including that applicants that lacked the degree would not be able to perform the job duties successfully and that the job existed before the alien was hired. Alternatively, if the job did not exist prior to the alien being hired, then Employer must demonstrate a major change in business operations. Secondly, Employer may have violated 20 CFR 656.21

(b)(5) which provides that the employer must document that the job requirements for the job opportunity are the minimum necessary for the performance of the job, and that the employer has neither hired nor finds it feasible to hire workers with less training and/or experience. The CO stated that alien did not have experience as a Title Searcher at the time of hire in October, 1992. Moreover, the record does not demonstrate that alien had experience with Windows 95, 5.1 NT, Word Perfect, Microsoft Office and Corel Office Suite prior to hire by Employer. Corrective action would require documentation that alien had experience as a Title Searcher and with the various computer related software at time or hire; or documentation that the alien gained the required experience with Employer in jobs which were not similar to the job for which labor certification is sought; or, submitting evidence that it is not feasible presently due to business necessity to hire a worker with less than the qualifications presently required for the job opportunity. In both the latter two alternative requirements, the CO set out specific documentation concerning Employer's business that would need be demonstrated in order to rebut the CO's findings.(AF-61-64).

Employer, May 13, 1999,by its President, forwarded its rebuttal, stating that the job of Network Administrator or Network Control Operator did not exist prior to alien joining the firm. Employer stated: "The Job opportunity was expanded to include anyone who had a Natural Science diploma. Otherwise the job position would necessitate that the applicant have a specialist degree in maybe Computer Technology along with Network Certification from Microsoft or Novell to be able to implement and administrate a network." After comparing the computer's operations to the human brain and nervous system, Employer stated the need for familiarity with the various software. Employer continued: "A foundation for understanding and learning about computers and networking (especially the physical topology or structure), is derived from the Natural Sciences. The math classes also enables one to grasp the concepts that are used in programming...Prior to coming to the United States Mr De Leon had already learned to install and troubleshoot networks and administrate the network as well. It was part of his job requirement because he worked with indergraduate and graduate students. Whenever there was a new addition or changes to the network he and his supervisor had to learn about it..and implement the changes. Mr De Leon came to my attention through my contact with Carmel Bullard. She informed me that he had the required training and the type of experience I was looking for in a Title Searcher...Mr. De Leon had the cross skills to help with the computerization of the company which began roughly two years ago and also do title searching. It would cost the company about $50,000 per year to contract out the computerization and hire someone in the office just to administrate the use of the computers...Due to the competitive nature of our business, computerization increases our efficiency, reduces our need for storage space, enables us to have all our records and files on hand and allows LRG to maintain its high quality of service to

its clients."" Employer, also, included a letter from an official of the University of the West Indies outlining alien's computer skills and usage. Additionally, a letter was attached from Carmel Bullard, Title Examiner, under letterhead of Title Research Services, which stated she had known alien for twenty years and that: "In February 1991 he began training with this company to research real estate titles in Washington, D.C. In the ensuing year and eight months he learned to thoroughly and accurately research both residential and commercial properties. Researching Titles in D.C. requires a working knowledge of the D.C. Real Estate Code, accuracy, great attention to detail, speed, and most of all the ability to read and interpret the legal documents that surface in the process of the title search. Mr. De Leon has far exceeded the ability to do all of the above." (AF-56-60)

On August 12, 1999, the CO issued a Final Determination, denying labor certification. The CO found that Employer had not documented that the job requirements were not unduly restrictive. The CO stated: "Form ETA 750, Part A, reflects that an Associate's degree in Natural Science is the only qualifying degree for the job opportunity reflected in the instant application; no alternative degree or educational requirement was specified on the application form. According to the U.S. Department of Labor, Occupational Outlook handbook dated May 1944, many employers seek applicants who have a bachelor's degree in computer science, information science, computer information systems or data processing. Second, other than your analogy of a computer to the human body, you have provided no evidence which reflects that an Associate's Degree in Natural Science is a normal educational path for a career as a computer professional. Finally, you have failed to demonstrate that the requirement for an Associate's Degree in Natural Science arises from a business necessity, by demonstrating that the requirement bears a reasonable relationship to the occupation in the context of your business and is essential to perform the job duties in a reasonable manner. You have provided no evidence which reflects that the job duties described in the instant application could not be performed without a network Control Operator with an Associate's Degree in Natural Science."" Secondly, the CO, also, found Employer did not provide documentation that demonstrated rebuttal of the NOF finding that alien was hired without the required knowledge and experience. The CO stated: "The evidence presented clearly reflects that you hired the alien in October 1992 without one and one-half years of experience as a Title Searcher, and without knowledge of Windows 95, 5.1 NT, Wordperfect, Microsoft Office or Corel Office Suite, and allowed alien to gain the required experience and knowledge while in your employ. Inasmuch as you have failed to submit evidence which reflects that it is not presently feasible due to business necessity to hire a worker with less than the qualifications presently required for the job opportunity, the requirements do not represent the minimum necessary for the performance of the job..." (AF-52-55)

Employer appealed, September 15,1999 (AF-1-52)

**DISCUSSION**

Section 656.25(e) provides that the Employer's rebuttal evidence must rebut all the findings of the NOF, and that all findings not rebutted shall be deemed admitted. Our Lady of Guadalupe School, 88-INA-313 (1989); Belha Corp., 88-INA-24 (1989)(en banc). Failure to address a deficiency noted in the NOF supports a denial of labor certification. Reliable Mortgage Consultants, 92-INA-321 (Aug. 4, 1993). On the other hand, where the Final determination does not respond to Employer's arguments or evidence on rebuttal, the matters are deemed to be successfully rebutted and are not at issue before the Board. Barbara Harris, 88-INA-32 (April 5, 1989) Where the CO reasonably requests specific information to aid in the determination of whether certification should be granted, the employer must provide it. Landscape Service Corporation, 96-INA-085(Jan. 26, 1998); Collectors International, Ltd.,89-INA-133(Dec. 14, 1989).

Section 656.21(b)(2) proscribes the use of unduly restrictive job requirements in the recruitment process. Unduly restrictive requirements are prohibited because they have a chilling effect on the number of U.S. workers who may apply for or qualify for the job opportunity. The purpose of 656.21(b)(2) is to make the job opportunity available to qualified U.S. workers. Venture International Associates, Ltd., 87-INA-569(Jan. 13, 1989)(en banc). A job opportunity has been described without unduly restrictive requirements where the requirements do not exceed those defined for the job in the DOT and are normally required for a job in the United States. Ivy Cheng, 93-INA-106 (June 28, 1994). Lebanese Ark Corp., 87-INA-683 (April 24,1989)(en banc)

The fact situation indicates that communications between Employer and the CO focused on different aspects of the application causing miscommunication and misunderstanding, some of which was belatedly addressed by Employer in its petition for review. Moreover, some facts are not clear from the entire record. For example, alien in its ETA states he was employed in Trinidad/Tobago at the University up until October, 1992. On the other hand, Employer forwarded a letter from Carmel Bullard, alleging that alien had one year and eight months experience as a title searcher in the company Ms. Bullard worked for as an examiner, commencing in the spring of 1991. On its face this would be an impossibility if the ETA is correct. Neverthe-less, this inconsistency was not given specifically by the CO as a basis for denial. Rather the CO stated, in general terms that alien did not have prior experience as a Title Searcher. While I share skepticism as to the credibility of alien's work as an examiner at the company cited by Ms. Bullard, Title Research Services, the ability to engage in such work is partially cleared up in Employer's petition for review which demonstrates alien was matriculated at the University of the District of Columbia commencing March, 1991, and therefore, was probably not in

Trinidad/Tobago. Similarly, Employer was clear that the job opportunity did not exist prior to alien's filling the position. However, the CO did not specifically deny certification because Employer did not demonstrate the business necessity of a new position, even though it set out specific documentation requirements that Employer/alien did not furnish on rebuttal. By the same token, the necessity for computer training of one kind or another was urged by Employer on rebuttal, yet in its appeal Employer acknowledged that the computer program was only initiated two years previously (which would place its commencement at approximately 1996 or 1997). Employer leaves unanswered why computer experience was needed at the time alien was hired.

Taking into account the entire file, it would appear that alien was in actual fact hired as a title searcher and later performed the valuable service of assisting in the computerizing of the business. Conversion to computers is explained with much conviction in Employer's brief as a business necessity in today's competitive world of high tech. Moreover, alien appeared to hone his relatively moderate computer skills prior to hiring, by attending classes at the University of the District of Columbia while with Employer. While not so finding, it is possible that alien's computer experience could be a business necessity in meeting Employer's new requirements in the Title Search business, particularly in the District of Columbia. In order to ascertain same, however, the CO must be given the documentation that he requested in his NOF but did not receive if Employer based his business necessity requirement on a new position, i.e. position descriptions, organizational charts, payroll records, resumes of former incumbents, etc. Moreover, it would appear that Employer must document a major change in business operations which caused the requirement of the combination of computer skills and title searcher.

While we find that the CO was justified in denying certification on the narrow basis that Employer tailored the job requirement to have an Associate Degree in Natural Science to alien's qualification, we believe under the circumstances, and giving the Employer the benefit of the doubt that he may have been confused by the certification procedures, a proper course is remand. Should Employer seek certification and convince the CO that errors of ommission were justified, he must readvertise under proper job requirements to be determined by the CO. We would further urge more candor by Employer in providing documentation that may be required by the CO.

## ORDER

The Certifying Officer's denial of labor certification is VACATED and the matter remanded for action consistent with this decision.

For the Panel:

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JOHN C. HOLMES
Administrative Law Judge

BOARD OF ALIEN LABOR CERTIFICATION APPEALS
800 K St., N.W.
WASHINGTON, D.C. 20001-8002

Date:
Case No: 95-INA-286

In the Matter of:

M.K. DESIGNERS, INC.
Employer

On Behalf of:

SETRAK MERACHIAN
Alien

Appearance: Baliozian & Associates
for the Employer and the Alien

Before: Holmes, Huddleston and Neusner
Administrative Law Judges

JOHN C. HOLMES
Administrative Law Judge

**DECISION AND ORDER**

This case arose from an application for labor certification on behalf of alien, Setrak Marachian ("Alien") filed by Employer M.K.Designers, Inc. ("Employer") pursuant to 212(a)(5)(A) of the Immigration and Nationality Act, as amended, 8 U.S.C. 1182(a)(5)(A)(the "Act"), and the regulations promulgated thereunder, 20 CFR Part 756. The Certifying Officer ("CO") of the U.S. Department of Labor, San Francisco, California, denied the application, and the Employer and Alien requested review pursuant to 20 CFR 656.26.

Under 212(a)(5) of the act, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor may receive a visa if the Secretary of Labor ("Secretary") has determined and certified to the Secretary of State and to the Attorney General that (1) there are not sufficient workers who are able, willing, qualified and available at the time of the application and at the place where the alien is to perform such labor; and, (2) the employment of the alien will not adversely affect the wages and working conditions of the U.S. workers

similarly employed.

Employers desiring to employ an alien on a permanent basis must demonstrate that the requirements of 20 CFR, Part 656 have been met. These requirements include the responsibility of the Employer to recruit U.S. workers at the prevailing wage and under prevailing working conditions through the public employment service and by other means in order to make a good faith test of U.S. worker availability.

The following decision is based on the record upon which the CO denied certification and the Employer's request for review, as contained in an Appeal File ("AF"), and any written arguments of the parties.

## STATEMENT OF THE CASE

On April 15, 1993, the Employer filed an application for labor certification to enable the Alien, a Lebanese national, to fill the position of Wood Machinist in its cabinet and furniture manufacturing and construction company.

The duties of the job offered were described as follows:

> Responsible for set up and operation of woodworking machinery for fabrication of doors, windows, cabinets, and fine furniture. Operate power saws, drills, drill presses, sanders, tenoner, mortising machine, boring machine, router,and hand tools. Prepare parts according to specifications. Follow intricate design specifications for furniture orders.

No educational requirements and two years experience in the job were required. Wages were $640.00 per week. (AF-25-53)

On June 22, 1994, the CO issued a NOF denying certification, finding that a U.S. applicant, Kenneth R. Pruett was unlawfully rejected. Employer alleged in his undated recruitment results report that applicant Pruett had stated the job site was too far. In a signed questionnaire from Mr. Pruett, he stated that he would not have turned down a job for $16.00 per hour, indeed, that he would have gone to Chicago or New York for that money. He further stated that he received a phone call from a woman who asked him if he could do carvings. She also asked if he could speak Farsi. The woman told him he was not qualified and hung up.(AF-21-23)

Employer, June 29, 1994, forwarded its rebuttal, stating: "As Mr. Pruett stated to you in his questioneer, Mrs. Keuroghlian asked the applicant if he had experience doing wood carving, using the specialized equipment and hand tools as was required in the job description, to construct some of the more intricate detail designs on furniture and cabinets. He responded that he was not able to do carvings. It was based upon this response that

he was told that he was probably not qualified. Mr. Pruett also stated to Mrs. Keuroghlian that the job site in Glendale was too far to come for a job." (AF-9-20)

On August 23, 1994, the CO issued a Final Determination denying certification since Mr. Pruett as a master carpenter according to his resume who owned and operated a custom cabinet shop was qualified for the job opportunity. The fact that he cannot do carvings with chisels is not pertinent since the duty was not listed on the ETA 750A form. (AF-6-8)

On September 7, 1994, Employer filed a request for review and reconsideration of Final Determination. (AF-1-5)

## DISCUSSION

Section 656.25(e) provides that the Employer's rebuttal evidence must rebut all the findings of the NOF, and that all findings not rebutted shall be deemed admitted. Our Lady of Guadalupe School, 88-INA-313 (1989); Belha Corp., 88-INA-24 (1989)(en banc). Failure to address a deficiency noted in the NOF supports a denial of labor certification. Reliable Mortgage Consultants, 92-INA-321 (Aug. 4, 1993).

Section 656.21(b)(6) provides that an employer must show that U.S. applicants were rejected solely for job-related reasons. Employers are required to make a good-faith effort to recruit qualified U.S. workers for the job opportunity. H.C. LaMarche Ent.,Inc. 87-INA-607 (1988). As a general matter, an employer unlawfully rejects an applicant where the applicant meets the employer's stated minimum requirements, but fails to meet requirements not stated in the application or the advertisements. Jeffrey Sandler, M.D., 89-INA-316 (Feb.11, 1991)(en banc).

We find the CO was correct in finding that the rejection of Mr. Pruett was unlawful, in that he appeared well qualified for the position and expressed an interest in accepting same. Employer's reason for rejection was that applicant was not familiar with a hand chisel, a duty that was not set out in the job requirement and would not appear to be accurate, given his long and intimate experience in the field. Where an applicant's resume shows a broad range of experience, education, and training that raises a reasonable possibility that the applicant is qualified, although the resume does not expressly state that he or she meets all the job requirements, an employer bears the burden of further investigating the applicant's credentials. Gorchev & Gorchev Design, 89-INA-118 (Nov. 29, 1990)(en banc).

## ORDER

The Certifying Officer's denial of labor certification is AFFIRMED.

For the Panel:

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JOHN C. HOLMES
Administrative Law Judge